NO. 3378

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

14

ALASKA MINES CORPORATION,
a Corporation,
Appellant,
— vs. —
HERBERT GREENBERG,
Appellee.

No. 3378

Upon Appeal from the United States District Court for the Territory of Alaska, Second Division

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is a suit in equity, brought by appellee, plaintiff below, to foreclose a certain mortgage upon certain real and personal property situated in the Cape Nome Recording District, Alaska. The facts in the case are undisputed.

On April 17, 1917, appellant, being the owner of the real and personal property covered by the mortgage, at New York City, where it had its principal office and place of business, duly exe-

cuted its three promissory notes in writing, payable to the order of appellee at different times. These notes were for $5,000.00, $10,000.00 and $25,000.00 rspectively. (Transcript pp. 1-4, 68-71.) To secure the payment of the debt evidenced by these notes, appellant executed the mortgage in question on the same day the notes were executed. This mortgage was in proper form as a real and chattel mortgage, and it was duly recorded and filed as such. (Tr. pp. 9-22, 71, etc.)

On the same day the notes and mortgage were executed, appellee and one George K. McLeod entered into an agreement in writing, which recited the consideration, the cancellation of a prior agreement between said parties, and the execution of the notes and mortgage in question, referring to them as a "certain bond and mortgage in the sum of Forty Thousand ($40,000.00) Dollars."

The agreement then provided that:

> "Herbert Greenberg hereby *assigns* to George K. McLeod, an undivided eleven fortieths (11/40) interest in the aforesaid bond and mortgage of the Alaska Mines Corportaion.
>
> "Said Greenberg hereby agrees to receive any sums paid on account of the or notes of said Corporation, and said Mortgages, as trustee, and to pay over to said McLeod one-half thereof, until the sum of Eleven Thousand ($11,000.00) Dollars is paid thereout to said McLeod, and if the said Greenberg received

interest, he is also to pay to said McLeod interest on said Eleven Thousand ($11,00.00) Dollars, or any balance remaining due at any time.

"The parties agree that when said McLeod shall have received said Eleven Thousand ($11,000.00) with interest if any, he will *reconvey and release* to said Greenberg said Eleven-fortieths (11/40) of said bond and mortgage *just conveyed* to him, and *revest* in said Greenberg *all interest in said mortgage conveyed to him.*" (Italics ours.)

(Tr. pp. 47, 86, 136-138.)

The agreement then contained certain provisions to apply in case these notes were not paid by appellant. The notes were all made payable at Empire Trust Company, New York City. The notes for $5,000.00 and $10,000.00 were duly paid, and the last note, for $25,000.00, less a credit endorsed thereon on the day of its execution, fell due on January 15, 1918.

On January 11, 1918, said George K. McLeod served on appellant, at its New York office, a written notice as follows:

"January 11th, 1918.

Alaska Mines Corporation,
71 Broadway,
New York City.

"Gentlemen:

"You will please take notice ,that heretofore and by a written instrument, the original

pellee had failed and refused to pay said McLeod his one-half of the amount so collected, as provided by said agreement of April 17, 1917, between them. At the time of the commencement of said action, McLeod caused a writ of attachment to be issued out of said court, and the sheriff of said county duly served a notice of attachment, together with a copy of said writ, upon appellant at New York City at 3:50 P. M. on said January 15, 1918, the day said note fell due. (Tr. pp. 28-31, 34-61, 64, 87.) Appellee appeared in said action, and admits that said Supreme Court of New York had jurisdiction over the parties to said action, including himself, and of the subject matter thereof.

The suit so commenced by McLeod against appellee was pending up to the time of the trial of this suit, so far as appears from the record; and the writ of attachment so issued and served on appellant remained in full force and effect until September 27, 1918, more than five months after the commencement of this suit, when it was released under a bond given by appellee for that purpose. (Tr. pp. 87, 119-122.)

The suit at bar was commenced April 18, 1918, seeking a foreclosure of said mortgage for default in payment thereof. The action was commenced in the name of appellee alone, as plaintiff, McLeod not being joined either as plaintiff or defendant; no mention of his interest in the debt secured by the mortgage is made in the complaint, nor does

appellee sue as trustee for McLeod, but appellee alleges he was then the lawful owner and holder of the note and mortgage. (Tr. p. 6.)

Appellant answered the complaint, alleging affirmatively the notice served on it by McLeod, of his interest in the note and mortgage; also the agreement between McLeod and appllee of April 17, 1917, and McLeod's interest by reason thereof; and also the suit and attachment proceedings above mentioned. It also pleaded affirmatively the tender of payment made to the Empire Trust Company. (Tr. pp. 24, etc.)

Before the trial, and on February 1, 1919, appellant moved the court for an order requiring and directing that said George K. McLeod be brought into the action as a party plaintiff or defendant, on the ground that he was a real party in interest and a necessary party to the suit. (Tr. pp. 95, 96.) Appellee answered the motion, that McLeod had no interest in the note and mortgage; that he was a resident of New York and then outside of Alaska; that appellee was the trustee of an express trust; and that McLeod was not a necessary or proper party to a complete determination of the action. (Tr. pp. 97-98.)

The court denied the motion on the ground that appellee "was the trustee of an express trust, and, as such was authorized to sue in his own name." To this ruling appellant duly excepted. (Tr. p. 123.)

Thereafter and on February 15, 1919, appellant

asked and obtained leave to make certain amendments by interlineation in its answer, relative to its tender of payment at New York (Tr. p. 62); and at the same time appellee filed his amended reply, denying in part the allegations of tender in the answer. (Tr. pp. 63-67.)

There after and on February 19, 1919, appellant moved for a continuance of the cause, to enable it to obtain evidence in New York to prove its allegations of tender, which were denied in the amended reply served and filed four days previously, which motion was denied, and appellant excepted. (Tr. pp. 124-131.)

The case proceeded to trial on February 21, 1919, upon testimony offered in behalf of appellee. At the close of appellee's case, appellant moved for a dismissal of the action upon the grounds that—

(a) "It is shown by the pleadings and by the evidence that one George K. McLoed is a necessary party to this action, and necessary to a complete determination of the action, being an assignee under contract of eleven-fortieths interest in the identical note sued upon and the mortgage sought to be foreclosed in this action."

(b) "It is shown upon the face of the note that the note is payable at the Empire Trust Company in the city of New York, and that tender was made, at the date that the same became due, to the Empire Trust Company of

the amount due, which tender was refused by the Empire Trust Company by reason of its failure and inability to give the satisfaction of the mortgage sought to be foreclosed."

(c) "And for the further reason of an attachment being levied by one George K. McLeod in an action pending in the Supreme Court of the State of New York, for the County of New York, against the property of the plaintiff, Herbert Greenberg, in the hands of the defendant, Alaska Mines Corporation."

This motion was overruled, and appellant excepted. (Tr. pp. 165, 166.)

The court thereupon announced that he would give judgment in favor of appellee, with costs, including an attorney's fee of 10%, or $2,499.00.

Findings of Fact and Conclusions of Law, in accordance with the court's decision, were made and filed March 10, 1919 (Tr. pp. 68-90); and judgment thereon, and for a foreclosure of said mortgage and sale of the mortgaged property, was signed and filed March 15, 1919. (Tr. pp. 90-94.)

Questions Presented on Appeal

This appeal was duly allowed and taken, and is prosecuted from the judgment so entered.

The questions involved in this statement of the case and presented here by the assignment of errors, together with the manner in which those questions are raised upon the record, are as follows:

I.

Appellant will contend that it made a legal tender of the full amount due upon the note and mortgage at the time and place the same was payable; that the refusal of such tender operated as a release of the lien of the mortgage so that no foreclosure thereof could be had, and the action should have been dismissed.

Errors Nos. V, XI, XIII, XIV, XVI and XVII will be considered under this question.

II.

Appellant will contend that George K. McLeod was a necessary party to the action, and appellee had no legal right to prosecute the action without making said McLeod a party thereto, either as a plaintiff or a defendant therein; and the judgment cannot stand for this reason.

Errors Nos. II, IV, VII, VIII, X, XII, XV and XVII will be considered under this question.

III.

Appellant will contend that there could be no default in the mortgage nor any foreclosure thereof, while the attachment in the Supreme Court of New York remained undischarged; and for this reason the action was, in any event, prematurely brought and should have been dsimissed, or, in any event, no costs or attorney's fees allowed at all, or at least for services prior to the release of such attachment.

Errors Nos. V, VI, IX, XII, XIII, XIV and

XVII will be considered under this question.

IV.

Appellant will contend that, if there is any question under the evidence as to the sufficiency of its tender, in any respect other than the condition attached thereto that a release signed by both appellee and said McLeod be furnished, then the court erred in denying appellant's motion for a continuance.

Error No. III will be considered under this question.

SPECIFICATION OF ERRORS RELIED UPON

II.

The Court erred in refusing and denying the motion of the defendant to make George K. McLeod a party to the said action.

III.

The Court erred and committed an abuse of discretion in denying the motion of defendant for a continuance of the trial of said action.

IV.

The Court erred in denying the motion of the defendant made at the close of plaintiff's testimony to dismiss the complaint for the reason and upon the grounds that it was shown by the pleadings and by the evidence that one George K. McLeod was a necessary party to this action and necessary to the complete determination of the action, being an assignee under contract of eleven-fortieths interest in the identical note sued upon and the mort-

gage sought to be foreclosed in this action.

V.

The Court erred in denying the motion of the defendant to dismiss the complaint of the plaintiff because it was shown upon the face of the note that the note was payable at the Empire Trust Company in the City of New York and that tender was made on the date that the same became due, tothe Empire Trust Company, of the amount due, which tender was refused by the Empire Trust Company by reason of its failure and inability to give the satisfaction of the mortgage sought to be foreclosed, and for the further reason that an attachment had been levied by one George K. McLeod in an action pending in the Supreme Court in the City of New York, for the County of New York, against the property of the plaintiff Herbert Greenberg in the hands of the Alaska Mines Corporation.

VI.

The Court erred in directing that ten per cent of the amount of principal and interest due upon *said should* be computed as attorney's fees in said action because it is shown by the records and pleadings that at the time of the commencement of this action an attachment was levied against the amount due upon the identical promissory note sued upon in this action in the hands of the Alaska Mines Corporation and in the hands of the Empire Trust Company, and that said attachment so levied

was not released until the 27th day of September, 1918, and because said action having been prematurely commenced, no attorney's fees should be allowed in any event until the release of such attachment on the 27th day of September, 1918, and because there is no evidence as to the amount of a reasonable attorney's fee in this action for the prosecution thereof after the date of the release of said attachment.

VII.

The Court erred in making its finding number X as follows:

The Court finds that the plaintiff is the lawful owner and holder of said mortgage and said promissory note designated Schedule "A-3."

VIII.

The Court erred in making its finding numbered XII as follows:

The Court finds there is due, owing and unpaid from defendant to plaintiff, in principal and interest, on said promissory note designated as Schedule "A-3," the sum of Twenty-four Thousand Nine Hundred and Ninety Dollars ($24,990.00).

IX.

The Court erred in making its finding numbered XIII as follows:

The Court finds that the sum of Twenty-four Hundred and Ninety-nine Dollars ($2,499.00) is a reasonable sum to be allowed for attorney's fees for the commencement and prosecution of this

action to foreclose said mortgage.

X.

The Court erred in making its finding numbered XVIII as follows:

The Court finds that George K. McLeod had no interest in the note and mortgage sued upon in this action, and that the said George K. McLeod is not a proper or necessary party to this action.

XI.

The Court erred in making its finding numbered XX as follows:

The Court finds that the defendant never made any lawful tender to plaintiff of payment of said note on the 15th day of January, 1918, or at any time, or at all.

XII.

The Court erred in making its finding numbered XXIII as follows:

The Court finds that each and all of the allegations and averments in the first cause of action in plaintiff's complaint contained are true and correct.

XIII.

The Court erred in making its conclusions of law numbered I as follows:

That the plaintiff, Herbert Greenberg, is entitled to a judgment and decree against the defendant, Alaska Mines Corporation, a corporation, for the sum of Twenty-four Thousand Nine Hundred and Ninety Dollars ($24,990.00), with interest at the rate of eight per cent per annum from February

21st, 1919, being the date of the entry of decree herein, together with the sum of Twenty-four Hundred and Ninety-nine Dollars ($2,499.00) as attorney's fees in this action, and costs of suit taxed at the sum of $.....

XIV.

The Court erred in making its conclusion of law numbered II as follows:

That the said judgment in favor of plaintiff, Herbert Greenberg, be adjudged a prior lien by virtue of the said mortgage upon all the real and personal property described therein, and that said mortgage therein mentioned be foreclosed in the manner provided by law, and the real and personal property therein described sold in the manner provided by law, and the proceeds thereof applied to the payment of the amount found due to the plaintiff on the said promissory note designated as Schedule "A-3," together with interest, attorney's fees and costs, and that any surplus be delivered to the said defendant.

XV.

The Court erred in making its conclusions of law numbered III. as follows:

That by virtue of the agreement between plaintiff herein and one George K. McLeod, described in paragraph XIV of defendant's answer and annexed thereto and marked Exhibit "A" attached to Exhibit "C," plaintiff became a trustee of an express trust, and may sue without joining with

him the person for whose benefit the action is prosecuted, because that if the plaintiff did in fact and in law become a trustee of an express trust pursuant to any agreement with said George K. McLeod, then such trust was terminated by the said George K. McLeod long prior to the commencement of this action.

XVI.

The Court erred in makng its conclusion of law numbered IV as follows:

That no lawful tender of the amount due upon said note and mortgage sued upon herein has ever been made by defendant to plaintiff.

XVII.

The Court erred in ordering, adjudging and decreeing that the plaintiff Herbert Greenberg do have and recover of and from the defendant Alaska Mines Corporation, a corporation, the sum of Twenty-four Thousand Nine Hundred and Ninety ($24,990.00) Dollars, with interest at the rate of eight per cent per annum from the 21st day of February, 1919, together with the sum of Twenty-four Hundred Ninety-nine ($2,499.00) Dollars attorney's fees and costs of suit; and that the real and personal property described in said mortgage be sold to satisfy said judgment and decree. (Tr. pp. 175-180.)

ARGUMENT

TENDER

On the day the last note, secured by the mortgage

in question, fell due ,appellant tendered the full amount then due thereon to appellee's agent having the note for collection; such tender was made at the time and place when and where the note was payable, and the same was refused solely because the tender was conditioned upon a release being furnished signed by both appellee and George K. McLeod, to whom appellee had, in express terms in writing, assigned a 11/40ths interest. (Tr. pp. 31, 32, 65, 66, 87, 88, 142, 144-151.)

This being the only ground for the refusal of the tender, no other objection has been heretofore raised thereto, or will be considered on this appeal.

Appellee contends, and the trial court found and concluded, that the tender was not a "lawful tender," because a demand was made by appellant for a release of the mortgage to be executd by both appellee and McLeod. If the agreement between appellee and McLeod, dated April 17, 1917, transferred to McLeod an interest in the debt and mortgage securing the same, appellant had a legal right to require a release executed by both appellee and McLeod, and the tender was therefore sufficient.

> "A tender must not be coupled with any other conditions than those which it is the clear legal duty of the mortgagee to fulfill on receiving payment or satisfaction. But the mortgagor, on making tender to a person who claims to be the assignee of the mortgage, may require proof of his authority to collect the

surrender of the mortgage and note or bond, the delivery up of notes or property held as collateral security, and a release, cancellation, or entry of satisfaction of the mortgage."

27 Cyc. p. 1407.

"So a mortgagor who pays a bond and mortgage has a legal right to have the mortgage satisfied on the record. In no way except by a certificate of the holder of the mortgage can this result be accomplished. It is within the terms of the contract between the parties, and is a thing which, on payment of the debt, the mortgagee is under obligation to do, and one which a court of equity would compel him to do. It is a condition, therefore, which the mortgagor has a right to attach to the debt; and he may demand the production and tender of the debt, and does not destroy its effect."

Halpin v. Phoenix Insurance Co., 23 N. E. (N. Y.) 482, 485;

Engelbach v. Simpson, 33 S. W. (Tex.) 596;

Harding v. Giddings, 73 Fed. 335;

Wadleigh v. Phelps, 149 Cal. 627;

Johnson v. Cranage, 45 Mich. 14.

We think the rule announced in the foregoing authorities is universal, but if the rule is different in any other jurisdictions, then, the note, having been made in New York, payable there, the New York rule, as stated above, would apply. Or, if the

Alaska rule would apply, then the Alaska Code, § 1512, Compiled Laws of Alaska, 1913, would entitle appellant to impose the same condition. This section provides:

> "Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery."

Section 1513 provides:

> "The person to whom a tender is made shall at the time specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

Under this code provision, as well as the settled general rule of law, appellee cannot now object to the tender on any ground other than because of the condition for a relase which appellant attached to the tender.

But appellee contends that the agreement of April 17, 1917, between himself and McLeod, did not give McLeod such an interest in the note and mortgage as to entitle appellant to a release signed by McLeod as well as by appellee, and therefore

the condition was not proper and the tender insufficient.

In the lower court, appellee based this contention on two grounds: First, that the note could not be assigned without delivery; and second, that the agreement in question constituted appellee the trustee of an express trust for the benefit of McLeod, so that his signature to a release was unnecessary.

As to the first ground, the weight of authority is clearly the other way.

> "Where there is a note, bond, or other written obligation evidencing the debt, it has sometimes been said that there must be a delivery of the instrument. But by the weight of authority, delivery is not necessary if the assignment is proved by other satisfactory evidence.
>
> "Thus, where an assignment of a chose in action is made by a separate paper it will be valid, although the written evidence of the chose in action is not delivered."
>
> 5 C. J. p. 903, and cases cited.

The lower court held with appellee on the second ground, construing the agreement of April 17, 1917, between appellee and McLeod as constituting appellee the irrevocable trustee of an express trust, rather than as a transfer of an interest in the note and mortgage and the debt evidenced and secured thereby. If, as we contend, the court was in error

in so holding, then admittedly, the judgment must be reversed.

The record shows that at the time this agreement was executed, appellee was indebted to McLeod in the sum of $11,000.00 balance, which was secured by an agreement between them dated October 9, 1914. (Tr. pp. 111-115, 138.)

By the April 17th agreement, the agreement of October 9, 1914, was cancelled. The execution of the notes and mortgage by appellant to appellee is then recited, and the agreement then provides:

> "Herbert Greenberg *hereby assigns* to George K. McLeod an undivided eleven-fortieths (11/40) *interest* in the aforesaid bond and mortgage of the Alaska Mines Corporation." (Italics ours.)

It further provides:

> "The parties agree that when said McLeod shall have received said Eleven Thousand ($11,000.00) with interest if any, he will *reconvey* and *release* to said Greenberg said eleven-fortieths (11/40) *of said bond and mortgage just conveyed to him* and *revest in said Greenberg all interest* in said mortgage *conveyed* to him." (Italics ours.) (Tr. p. 47.)

These provisions clearly show the understanding and intention of the parties was to make an absolute transfer of an undivided interest in the notes and mortgage to McLeod, which would require a retransfer from McLeod to appellee when McLeod

had received his portion of the money due, in order to "revest" the whole title to the balance in appellee. Whether such transfer was a sale, or only for the purpose of securing the payment to McLeod of the $11,000.00 owing to him from appellee, makes no difference in this case.

The letter of April 17, 1917, from McLeod to appellee (Tr. pp. 118, 119), shows the same intention.

But appellee contends that this agreement constituted him the trustee of an express trust, because of the following provision therein:

> "Said Greenberg hereby agrees to receive any sums paid on account of the or notes of said Corporation, and said mortgages, as trustee, and to pay over to said McLeod one-half thereof, until the sum of Eleven Thousand ($11,000.00) Dollars is paid thereout to said McLeod, and if the said Greenberg received interest, he is also to pay to said McLeod interest on said Eleven Thousand ($11,00.00) Dollars, or any balance remaining due at any time."

We do not think this provision is sufficient to create a trust relation between the parties, except as to the moneys appellee actually received on account of the notes. It certainly did not give him a right to collect McLeod's interest in the moneys payable on the notes and mortgage, which right McLeod could not revoke, and against a claim

by McLeod himself, much less as against McLeod's protest, which he made by the notice served on appellant before the note in question was due. Much less did this provision reserve to appellee the legal title to the 11/40ths interest in the note and mortgage, which, by the other terms of the agreement, had been expressly *assigned* to McLeod.

The most this provision of the agreement could mean is, that appellee had authority, *as McLeod's agent to* collect McLeod's portion of the money, holding the same, when collected, as trustee; but this authority could be revoked by McLeod at any time, as the agency for such purpose was not coupled with any interest in appellee in McLeod's portion of the money. And such authority was revoked by McLeod when he served the notice on appellant that the 11/40ths interest had been assigned to him, and demanding that appellant pay him direct, instead of to appellee, his 11/40ths part of the money to become due. (Tr. pp. 27, 28.)

In the suit commenced by McLeod against appellee, McLeod alleged that appellee had collected the full amount due on the note of $10,000.00 which previously fell due, but that appellee failed and refused to turn over to McLeod one-half thereof, as he had agreed, although appellee admits he collected and received one-half thereof as trustee. (Tr. pp. 37-45.)

If these allegations were true, certainly those provisions of the agreement of April 17th did not

authorize appellee, over McLeod's protest, to collect McLeod's part of the last note also and refuse to pay that to McLeod. Nor could he do this even if McLeod's claim as to the money collected on the previous note were not true. McLeod still had a right to revoke appellee's authority to collect the 11/40ths of the money payable on the note in question, and require appellant to pay it to him.

In any event, we contend that appellee has no standing in a court of equity, in face of this agreement which he admits was made and still in force, and the dispute between himself and McLeod, to compel appellant to pay him the full amount due one the mortgage, accepting his release alone of the mortgage; and in default of such payment he had no right to ask a foreclosure of the mortgage, with large attorney's fees and costs, especially when appellant was at all times ready, able and willing to pay the full amount due upon receipt of a release signed by both parties entitled to the money and holding legal title to the mortgage, and it had offered to do so at the time and place the note fell due.

We do not think any authority can be cited to sustain such a contention on appellee's part. On the other hand, we think that appellant was entitled to such release from both said parties because, first, appellee was not a trustee of an express trust, as defined in the Alaska Code (which is similar to most other codes, or otherwise; second, because

McLeod, not appellee, held the legal title to a portion of the note and mortgage, which appellant had a right to have released by him as a condition of payment of the full balance due; or, third, that McLeod had at least such an equitable title thereto, or beneficial interest therein, as entitled appellant to such release from McLeod.

We submit that the following authorities sustain our contentions in these respects.

> "The distinction between a power and a trust has been clearly defined by the court. A mere power is not imperative, but leaves the action of the party receiving it to be exercised at his discretion—that is, the donor or grantor, having full confidence in the judgment, discretion and integrity of the party, empowers him to act according to the dictates of that judgment and the promptings of his own heart. A trust is imperative, and is made with strict reference to its faithful execution. The trustee is not impowered, but is required to act in accordance with the will of the one creating the trust."
>
> Tiffany & B. Trusts & Trustees, quoted in *Law Guaranty, Etc., Co. v. Jones*, 103 Tenn. 245.
>
> 39 Cyc. 35, 66.
>
> 30 Cyc. 85, etc.

Cogan v. Conover Mfg. Co.
64 Atl. Rep. 973.

"Since the appellants have parted unconditionally with their interests in the property,

they cannot be trustees of an express trust with relation thereto."

Sweeney v. Waterhouse & Co., 39 Wash. 507.

Mitau v. Roddan, 84 Pac. (Cal.) 145.

In the agreement in question, appellee does not promise to collect the money on the notes, nor to do anything in connection therewith, except that he "agrees to receive any sums paid" on account thereof. He is permitted to receive the money, not required to do so. If he failed to take any steps to collect the money, he could not be held liable for breach of trust, but McLeod could only collect the money himself from appellant.

While, of course, appellee might have constituted himself trustee of the note and mortgage for the benefit of McLeod, yet, when he claims such relationship, rather than some other, over McLeod's protest, the intent on the part of both parties to the agreement to create such a trust relation must be clear, unmistakable, and not inconsistent with the transfer in express terms of the title to a portion of the note and mortgage to Mr. McLeod.

"A valid and effectual release of a mortgage can only be given by the person who is the rightful owner of the debt which it secures. Hence, after an assignment of the debt and mortgage, authority to give a release resides in the assignee, not in the assignor."

27 Cyc. 1416.

First Nat. Bank v. Miner, 48 Pac. (Colo.) 837.

"The assignment of a part of the debt secured by a mortgage, or of one of several notes so secured, carries with it a proportional interest in the mortgage and the security which it affords, unless it is otherwise agreed between the parties, although there is no formal assignment of the mortgage or any part of it."
27 Cyc. 1289, also 1286.

"There are numerous cases in which courts of equity will recognize a third person as entitled to the rights and privileges of an assignee of a mortgage, although there has been no formal transfer of the security to him; as in the case of an attempted written assignment which proves defective or invalid, an informal agreement to assign or give the third person the benefit of the security."
27 Cyc. 1293.

"The original mortgagee, even if the legal title to the mortgage has not been transferred, will thereafter hold it in trust for the assignee, and cannot release or discharge any portion of the debt secured or of the property covered, to the prejudice of the rights of the assignee."
27 Cyc. 1297, also 1299.

Generally "an assignment of a portion of the mortgage debt carries with it, by operation of law, an assignment of a proportionate

share of the mortgage security."

27 Cyc. 1304.

"An assignment of one of several notes secured by mortgage, or an assignment of any distinct part of the indebtedness secured, carries with it a *pro tanto* interest in the mortgage; and such has been held to be the effect in the assignment of a certain amount of the mortgage moneys, with a right to priority payments."

Jones on Chat. Morts. (3rd Ed.) § § 504, 505.

"It is for the assignee of a mortgage to receive payment of the debt secured and to give a good satisfaction and discharge of the mortgage."

27 Cyc. 1314.

In the lower court, appellee contended that the decision of this court in the case of *Northern Commercial Co. v. Lindblom*, 162 Fed. 250, is authority to sustain his position that he was the irrevocable trustee of an express trust. But in that case the shipper of goods owned them until they were delivered at the mine, and he had never assigned the bills of lading. The case is not in point. On the other hand, where a shipper has assigned the bills of lading, he cannot collect damages for loss of the goods, either as trustee of an express trust, or otherwise.

Sweeney v. Frank Waterhouse & Co., 39 Wash. 507, 81 Pac. 1005.

If we are correct that a lawful tender was made, then the lien of the mortgage was discharged and there was no mortgage to foreclose. Much less could appellee refuse to comply with the conditions the law imposed as a result of his own written contract of assignment ,and ask a court of equity to decree a foreclosure of the mortgage lien, with heavy attorney's fees and costs of such foreclosure. Appellee's remedy, then, was to sue on the debt, joining McLeod in the suit, and ask to have the rights of himself and McLeod to the money settled, and McLeod required to execute a proper release. In such an action, appellant could have paid the money into court and been protected against costs, and secure a release of its mortgage from all parties interested therein either legally or equitably.

> "A due tender at maturity discharges the lien of the mortgage, although not kept good." 27 Cyc. 1409.
>
> *Kortright v. Cody*, 21 N. Y. 343.
>
> *Thomas v. Seattle Brewing & Malting Co.*, 48 Wash. 560, 94 Pac. 116.
>
> *Easton v. Littooy*, 91 Wash. 648, 158 Pac. 531.
>
> *Cass v. Higenbotam*, 3 N. E. (N. Y.) 189.

But appellee contends appellant cannot have the advantage of its tender, even if sufficient when made, because it did not bring the money into court in this action.

The rule that a tender must be kept good by

bringing the money into court does not apply to a tender which discharges a lien but does not discharge the debt. In the latter case only must the tender be kept good by bringing the money into court.

38 Cyc. p. 172.

Thomas v. Seattle B. & M. Co., supra.

Easton v. Littooy, supra.

Murray v. O'Brien, 56 Wash. 361, 105 Wash. 840.

To require appellant to bring the money into court, would be only for the purpose of allowing appellee to accept it, without furnishing a release signed by McLeod. As he had no right to the money without furnishing such a release, there would be no purpose in requiring the money to be brought into court. Further, in equity, an offer in the pleadings to pay or perform is sufficient without actual deposit of the money in court. Again, where it appears that the tenderee is unable to perform the conditions the law imposes on him, before he is entitled to receive the money, no deposit in court is necessary.

Furber v. National Metal Co., 103 N. Y. Supp. 490.

Becker v. Boon, 61 N. Y. 317.

If appellant had a right to a release signed by both appellee and McLeod, to whom an interest in the mortgage had been assigned in express terms, then clearly it was not compelled to take the money,

which was payable in New York, to Alaska and pay it into court in an action to foreclose the lien, not merely to collect the debt, especially as appelee had refused and still refuses to furnish a release signed by McLeod.

For the foregoing reasons, we think the judgment must be reversed, and the action dismissed.

McLeod a Necessary Party

Even if the court should be of the opinion that the tender was not sufficient to require a reversal of the judgment, we think it must be reversed and the action dismissed, or, in any event, that a new trial be granted and McLeod ordered to be made a party.

If we are correct that appellee was not a trustee of an express trust, then it will be conceded that McLeod was a necessary party to this action. We think that he was a necessary party, plaintiff or defendant, as one of the real parties in interest, under the provisions of Section 857 of the Alaska Code, and under the general rules of equity pleading, even though some trust relationship existed between him and appellee. The following authorities sustain this contention.

> "In the strictest sense the only necessary parties are the mortgagee, the mortgagor, and those who have acquired interests in the premises subsequent to the mortgage. But the mortgagee here means not only the mortgagee of record, but also the real owner of the

debt, or all the persons who are entitled to share in it, or generally those to whom the substantial benefit of the foreclosure will accrue."

27 Cyc. 1563, 4.

"As a general rule no decree of foreclosure can be made unless all the parties to the mortgage money are before the court. Therefore one of two or more joint mortgagees cannot maintain an action for foreclosure without joining the others; if they refuse to join him as complainants, they should be made defendants."

27 Cyc. 1563, 4.

The Trades Savings Bank v. Freese, 26 N. J. Eq. 453.

"After a mortgagee has formally assigned and transferred the mortgage and debt, he cannot maintain an action for foreclosure; but if the assignment for lack of formality or on account of irregularity, was not sufficient to vest the legal title to the securities in the assignee, the suit must be brought in the name of the assignor, for the use and benefit of the assigne. But the owner of a mortgage is not prevented from foreclosing it in his own name by the fact that he has pledged it as collateral security for a debt less than the face value of the mortgage, if he acts with the consent of the pledgee, or if, on the

latter's refusal to foreclose, he joins him as a party."

27 Cyc. p. 1544.

"Any form of assignment of a mortgage, if absolute and unconditional, which suffices to transfer to the assignee the real and beneficial ownership of the securities, will entitle him to maintain an action for foreclosure.

"As an absolute assignment or transfer of the debt secured by a mortgage, or of the note or bond evidencing it, vests the ownership of the securities in the assignee, with all the assignor's rights accruing under the mortgage, even without any formal assignment of the mortgage itself, a person so holding and owning the debt secured will be entitled to foreclose the mortgage, although the latter instrument does not stand in his name."

27 Cyc. pp. 1544-5.

"Plaintiff in a foreclosure suit should be the real and beneficial owner of the debt secured, together with any others who are jointly interested with him in the security."

27 Cyc. 1568.

"The assignee of a mortgage may maintain in his own name a bill in equity, or a statutory action for its foreclosure."

27 Cyc. 1309.

"Where a mortgage is assigned as collateral security for a debt, it amounts to a mort-

gage of a mortgage, * * * It is the duty of the assignee to use proper diligence and care in the management of the securities, in order that the assignor may have the benefit of their avails. He may execute the power of sale contained in the mortgage, and may foreclose it, cutting off the rights not only of the mortgagor but also of his assignor, if the latter is properly joined as a party in the proceedings."

27 Cyc. p. 1314.

"As a rule, whenever the assignment of a chose in action vests the assignee with the ownership of the claim, the action is to be brought in the name of the assignee, as the real party in interest, and this whether the title of the assignee be regarded as legal or equitable."

30 Cyc. 47.

"The effect of the assignment being to divest the assignor of his ownership, an action on the chose can no longer be brought in his name, either alone or for the use of the assignee. Nor is the rule affected by the fact that the assignor, in making the assignment, has expressly authorized an action in his name upon the assigned chose in action, or has expressly stipulated that if an action is necessary he will bring it in his own name and turn over the proceeds to the assignee."

30 Cyc. 49.

"When the assignment did not pass the legal title but only the beneficial title, it is usual, in equity pleading, to make the assignor, holding the legal title, a party to the suit. But it was not fatal if the assignor was not joined as plaintiff, the necessary plaintiff was the assignee, as being the beneficial owner."

30 Cyc. 49.

"When the assignor retains a portion of the beneficial ownership, the general principle of the real party in interest gives him a standing as plaintiff. As a rule the assignee also should be a party to the suit, as co-plaintiff or as defendant."

30 Cyc. pp. 51, 85, etc.

Bacon v. O'Keefe, 43 Pac. (Cal.) 886.

The rules as to necessary parties in suits in equity, and the reasons therefor, are given and discussed at length in the leading case of

Mahr v. Norwich Union Fire Ins. Co., 28 N E. (N. Y.) 391.

For the reasons above given, and under the foregoing authorities and the provisions of Section 857 of the Alaska Code, we think McLeod was not only a proper, but a necessary and indispensable party to any suit upon the note in question, or to foreclose the mortgage securing the same; and therefore the judgment must be reversed.

THE NEW YORK ATTACHMENT

It will not be disputed that any defense to an action on the note could be made to this action to foreclose the mortgage.

> "As a general rule the same defenses may be made in a suit to foreclose a mortgage which might be made in an action on the debt which the mortgage is given to secure."
> 27 Cyc. 1549.

The note evidencing the indebtedness in question was made and payable in New York. Appellant had its principal office and place of business there. The day this note fell due McLeod duly attached the debt due from appellant on account of this note and mortgage. Appellee admits the New York court had jurisdiction of the parties, including himself, and of the subject matter of the suit (Tr. pp. 28-31, 64), and the court so found. (Tr. pp. 86, 87.) This New York action was pending, and the attachment in effect, when this suit was commenced, and until September 27, 1918, more than five months thereafter.

This suit was commnced because of an alleged then existing default for non-payment of the debt secured. We fail to see how appellant could be in default for non-payment, when payment was stopped by an attachment in an action against the party claiming the default. It would seem that appellee should have secured a release of the attachment and enabled appellant to make pay-

ment without liability to pay twice, before appellee could ask a court of equity, even in another jurisdiction, to find appellant was in default for non-payment.

Nor could the subsequent release relate back five months to the commencement of this suit, and constitute a default as of that time. If no default then existed, no right to foreclose existed, and this action was prematurely brought and must be dismissed, or at least modified by striking out all attorney's fees and costs.

> "The rights of a party to an action are ordinarily to be determined as of the time of bringing the suit."
>
> *Weeks v. Baker*, 152 Mass. 20.
>
> *Murray v. O'Brien*, 56 Wash. 361, 376.

Before appellee should be permitted to claim a default he should release the attachment, and no offer of security to appellant should suffice. When he did not do this, he had no right to declare the mortgage in default for non-payment and ask heavy costs for a foreclosure of the mortgage, which appellant could not safely pay so long as the attachment was in force.

The court allowed full costs and attorney's fees in the case "for the commencement and prosecution of this action to foreclose said mortgage." (Tr. p. 86.) No evidence was introduced, nor finding made, as to the value of the attorney's services after September 27, 1918, when the attach-

ment was released.

For these reasons we think the judgment should be reversed, or at least modified by striking out all costs and attorney's fees, and awarding appellant costs in this court.

> "The pending of garnishment proceedings in a foreign jurisdiction may be pleaded in abatement, or in bar, of an action upon the same cause."
>
> 20 Cyc. 1141, and cases cited.
>
> *Wallace v. M'Connell*, 13 Peters 143.
>
> "No effectual sale under a power or by decree of court in a foreclosure suit can be made until the occurrence of the event upon the happening of which a sale or foreclosure is authorized."
>
> Jones on Mortgages (3rd Ed.) § 1174.

Our contention on this point would seem so clear that the citation of further authority is unnecessary. If we are not correct, then a mortgagor ready, able and willing to pay his debt, but prevented from doing so by a valid attachment or garnishment thereof in a suit against his creditor, may be declared in default by the creditor, who permits him to remain liable under the attachment or garnishment; and he may be compelled to pay heavy costs or run the risk of having to pay his debt twice. Certainly that is not the law, and the lower court erred in decreeing a foreclosure in this case with full costs and attorney's fees,

merely because the attachment was released by appellee furnishing a release bond months after this suit was commenced and the expense incurred.

MOTION FOR CONTINUANCE

Appellant assigns error on the refusal of the trial court to grant a continuance to enable it to secure evidence in support of the amended allegations of its answer relative to its tender.

These allegations were merely to show that the check tendered by appellant in payment of the note was good. No objection was made that it was not good, nor that a check instead of cash was tendered, nor for any other reason than the condition attached requiring a release signed by McLeod. If we are correct that no other objection could or can be raised in this suit, this evidence was immaterial, and the ruling was correct. However, if the evidence was necessary to show a valid tender, then we think the trial court erred in refusing th continuance.

The amendments were allowed and made on February 15, 1919 (Tr. p. 62); the reply denying these allegations was filed the same day. That was the first time appellant knew it would be compelled to secure proof of these allegations. All its evidence on the question was in New York. Yet it was denied a continuance to secure this evidence and forced to trial without it on February 21, 1919. We think this was clearly an abuse of discretion, requiring a reversal, provided, of course, such

evidence would have shown a legal tender which is not otherwise established.

In Conclusion

Appellant has found itself in a very peculiar postion in this matter. It gave its note secured by mortgage, which it was ready and willing to pay when and where due, and offered to do so. Appellee had seen fit to transfer in writing an interest in this note and mortgage, whether absolutely or as security makes no difference. Appellant was not a party to this transfer, and had no interest in it. Appellant had paid the previous notes to appellee, but McLeod, claiming appellee had refused to account to him for his part of the money paid on one of the prior notes, decided to collect his own part of this note and served notice on appellant of his interest and a demand to pay him the amount thereof instead of paying all to appellee.

In these circumstances, certainly appellant had a right to be protected against a claim by McLeod, by requiring a release of the mortgage, which a payment of the note would satisfy, signed by both parties interested therein. It offered to pay in full upon that condition. But appellee refused this offer, and, in spite of McLeod's claim to an interest in the proceeds of this note and in the mortgage, and in spite of McLeod's attachment of appellee's interest in the debt on account of appellee's alleged refusal to account for the proceeds

of the previous note, appellee caused this action to be commenced thousands of miles away, asking a court of equity to find appellant was in default for non-payment of the debt, and to decree a foreclosure of the mortgage and a sale of appellant's property to pay to appellee the full amount of the debt, with heavy costs and attorney's fees.

Certainly before the court will permit the judgment entered under these circumstances to stand, it must feel compelled to do so. It is no answer for appellee to say he had physical possession of the note and mortgage and would surrender them on payment and give his own satisfaction of the mortgage. That would not protect appellant from McLeod's claim of an interest in the unpaid note, nor from his attachment on account of the payment of the previous note. Appellant had actual notice of McLeod's interest by assignment; and a payment to appellee of the full amount due, even if it received the note and mortgage from appellee, would not protect appellant from McLeod's claim, nor would appellee's satisfaction of the mortgage clear the record from McLeod's assignment which he had sent to the recorder for record. (Tr. p. 42.)

This is not a case where appellee is liable to lose any of this money to which he is entitled, if this foreclosure is denied. He can still sue appellant for the debt and bring McLeod into the action, so that their respective rights to the money

can be determined. Appellant is perfectly able and willing to pay the full amount due into a court which has jurisdiction to enter a judgment which will protect appellant from any claim by McLeod. Appellant has no interest in the dispute between appellee and McLeod, and in such an action it could protect itself against the costs of the suit made necessary only because of such dispute.

Appellee is not willing to have these matters settled in this manner, but asks a court of equity to force appellant to pay him the entire amount of the debt, with heavy costs and attorney's fees, leaving appellant liable to a suit by McLeod for his interest in the note and mortgage.

We think the rule of equity, that he who asks equity must do equity, has special application in this case; and that, for the reasons above given, the judgment appealed from should be reversed and the action dismissed, or appellee required to bring McLeod into the action and permit appellant to pay its debt, but without costs or attorney's fees.

Respectfully submitted,
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